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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

[redacted] 1925

PANAMA RAIL ROAD COMPANY,

Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased,

Respondent.

NOTICE OF APPLICATION, PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

RICHARD REID ROGERS,
Solicitor for Petitioner,
No. 63 Wall Street,
New York City.

The Rodin Press, 67 Warren St., N. Y. Tel. Walker 1600.

Notice of Application for Writ of Certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

PANAMA RAIL ROAD COMPANY,
Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased,
Respondent.

Sir:

YOU WILL PLEASE TAKE NOTICE that the annexed petition for a writ of certiorari to the Supreme Court of the State of New York for the County of Kings, will be presented to the Supreme Court of the United States at its court room at the Capitol, City of Washington, on Monday, February 9th,

1925, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Dated, New York, N. Y., January 26th, 1925.

Yours, etc.,

RICHARD REID ROGERS,
Solicitor for Panama Rail Road Company,
Petitioner.

To:

FREDERICK R. GRAVES, Esq.,
Solicitor for Agapito Vasquez,
Administrator, etc.

Petition for Writ of Certiorari.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1924.

PANAMA RAIL ROAD COMPANY,
Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased,
Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petition for a writ of certiorari, requiring the Supreme Court of the State of New York for the County of Kings to certify to the Supreme Court of the United States for its review and determination the case of Agapito Vasquez, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased, plaintiff-respondent, against Panama Rail Road Company, defendant-appellant.

The petition of the Panama Rail Road Company respectfully shows to this honorable court:

FIRST: This action was commenced by the service, on behalf of Agapito Vasquez, administrator, etc., the plaintiff in the trial court, of a summons and bill of complaint upon the Panama Rail Road Company, defendant in said court, on September 23, 1921, said action being brought in the Supreme Court of the State of New York for the County of Kings, Trial Term, and the said complaint praying for the recovery of damages by reason of the death of the plaintiff's intestate, in the sum of $35,750, said death being alleged by the plaintiff to have resulted from negligence of the defendant and its employees, by means of which the person of the plaintiff's intestate sustained personal injuries causing his death. The plaintiff's intestate was a seaman in the employment of the defendant, and his injuries were sustained while so employed, and on board a vessel of the defendant, and subsequent to the enactment of the Act of Congress of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, which amended the Act of March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185, so as to provide that in case of the death of a seaman as a result of a personal injury sustained under certain circumstances specified in said Act, the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury—said Act of June 5, 1920, being conveniently known as the "Jones Act"; and the aforesaid action was instituted under the provisions of said Jones Act.

SECOND: Issue having been duly joined, said action was tried in the said Supreme Court for the County

of Kings on the 25th and 26th days of April, 1923, and the defendant moved to dismiss the action on the ground that pursuant to the terms of Section 33 of said Jones Act, the state courts were without jurisdiction of actions instituted under said Act. This motion was denied, and judgment was entered for the plaintiff. An appeal was taken from said judgment to the Appellate Division of the Supreme Court for the Second Department, and on said appeal the defendant again contended, on the same ground as previously, that the state courts were without jurisdiction. The Appellate Division thereupon rendered a decision modifying the judgment of the Trial Term in a certain particular which is not material here, but affirming the judgment in the main, and upholding the jurisdiction of the state courts, and upon said decision a judgment was entered on the 12th day of May, 1924, in the office of the Clerk of the County of Kings, which is the place of record of the Supreme Court for the County of Kings, in favor of the plaintiff. Thereupon an appeal was taken from said judgment by the defendant to the Court of Appeals of the State of New York, on the ground that by the terms of Section 33 of the said Jones Act, the state courts were without jurisdiction of an action instituted under said Act; and on the 16th day of December, 1924, the said Court of Appeals made its order affirming the decision of the Appellate Division, and remitting the said order with the record of all proceedings to the Supreme Court for Kings County for the taxation of costs to the plaintiff, and for enforcement according to law. Thereupon, on the 19th day of January, 1925, a final judgment was duly rendered by said Supreme Court for the

County of Kings upon said order and remittitur of the Court of Appeals, in favor of the plaintiff and against the defendant.

THIRD: Your petitioner shows that the said judgment of the Supreme Court for the County of Kings upon the order and remittitur of the Court of Appeals of the State of New York was and is a final judgment in the highest court of the State of New York in which a decision in said suit could or can be had.

FOURTH: Your petitioner is advised and believes that the said judgment of the Supreme Court for the County of Kings upon the remittitur of the Court of Appeals of the State of New York is erroneous for the following reasons:

(a) That said court was without jurisdiction to hear and determine said cause, or to render said judgment in favor of the plaintiff, because it is provided in Section 33 of the aforesaid Act of Congress of June 5, 1920, known as the Jones Act, which Act applied to the injury complained of, and under which the said action was instituted, that jurisdiction of such an action as is provided for by the said Act, shall be under the jurisdiction of the court of the district in which the defendant-employer resides, and that the effect of the said language, among other things, is to provide that jurisdiction of an action brought pursuant to the said Act shall be confined to the courts of the United States.

(b) That the said judgment was further erroneous in that the record shows that there was no un-

seaworthiness upon the part of the vessel or its appurtenances or appliances, or negligence upon the part of the owner of the vessel, or any of its employees.

FIFTH: Your petitioner believes that this cause is properly reviewable by this court upon a writ of certiorari, because there was especially set up and claimed therein by the plaintiff (respondent in this application) a right or privilege under a statute of the United States, to wit: the right or privilege of having the said cause heard and determined in the courts of the State of New York; and the decision of the highest court of said state, now complained of by your petitioner, was in favor of such right or privilege.

SIXTH: Your petitioner further shows that the question as to whether the state courts have jurisdiction under Section 33 of the Jones Act is one as to which adverse views have been expressed by the federal and state courts, and as to which no final decision has been rendered by this Court, the question having been apparently reserved by this Court in the recent case of the *Matter of the East River Towing Co.* Thus in *Barrington* v. *Pacific Mail SS. Co.*, 282 Fed. 900, the District Court of Oregon held that no other court except the court of the district in which the defendant's principal place of business was located had jurisdiction of an action under the Jones Act. To the same effect was the decision of Cushman, J., in *Wenzler* v. *Robin Line SS. Co.*, 277 Fed. 812, 818. In *Lorang* v. *Alaska SS. Co.*, 298 Fed. 547, 549, Judge Netterer of the District Court of Washington, held with

reference to Section 33 of the Jones Act, that it must be conclusively presumed that it had reference to the "national" district court.

SEVENTH: Your petitioner is further advised that a writ of certiorari has been granted by this court in the case of *Engel* v. *Davenport* (No. 697, Oct. Term, 1924) to the Supreme Court of California, which court first held that the state court had no jurisdiction under the Jones Act, although this decision was qualified on rehearing.

EIGHTH: Your petitioner further shows that a number of cases have been brought in the state courts upon the assumption that the state courts have jurisdiction, and that it is desirable in the interest of a proper construction of the statute above referred to, that a final decision should be rendered by the Supreme Court of the United States fixing the jurisdictional rights of litigants under this section.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York for the County of Kings, commanding the said court to certify and send to this court a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of New York in the said case therein entitled "Agapito Vasquez, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased, plaintiff, against Panama Rail Road Company, defendant," to the end that the said case may be re-

viewed and determined by this court as provided in Section 237 of the Judicial Code of the United States, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said statute, and that the said judgment of the said Supreme Court of the State of New York in the said case, and every part thereof, may be reversed by this honorable court.

PANAMA RAIL ROAD COMPANY,
By EDWARD A. DRAKE,
Vice-President.

(Seal)

Attest:

W. R. PFIZER,
Secretary.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
CITY AND COUNTY OF NEW YORK,

EDWARD A. DRAKE, being duly sworn, deposes and says that he is vice-president of the Panama Rail Road Company, the petitioner above-named; that he has read the foregoing petition; that the same is true to his knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

EDWARD A. DRAKE.

Sworn to before me this
26th day of January, 1925.

T. F. BURRELL,
Notary Public
(Seal) for New York County.

I HEREBY CERTIFY that the foregoing stated grounds in support of the foregoing petition for a writ of certiorari in the above-entitled case are in my opinion well founded in points of law.

RICHARD REID ROGERS,
Solicitor for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1924.

Brief in Support of Application for Writ of Certiorari.

This action was brought under Section 33 of the Act of Congress of June 5, 1920 (41 Stat. 1007), amending Section 20 of the "Seamen's Act" (38 Stat. 1185) commonly known as the "Jones Act," to recover damages for the death of a seaman upon the defendant's steamship "General W. C. Gorgas." The action was brought in the Supreme Court for Kings County, State of New York, was affirmed by the Appellate Division, and further affirmed, without opinion, by the Court of Appeals of the State of New York.

The ground upon which the petitioner seeks a writ of certiorari is that under the Jones Act the state court was without jurisdiction; and in this connection, the petitioner begs to point out there has been as yet no definite opinion by any court of the United States settling this much-mooted question. In the State of New York the early decisions were against the jurisdiction of the state courts (see *Nox* v. *U. S. S. Board,* 193 N. Y. Supp. 340, and *Prieto* v. *U. S. S. Board,* 117 Misc. 703). Upon the other hand, the Appellate Division in *Tammis* v *Panama Rail Road Co.,* 202 App. Div. 226, and *Lynott* v. *Great Lakes Transit Corp.,* 202 App. Div. 613, sustained the jurisdiction of the state court in an action brought under the Jones

Act. The only opinion rendered by the Court of Appeals in which the matter is discussed is in *Patrone* v. *Howlett*, 237 N. Y. 394, 397, in which it is said the Jones Act provides for the venue, when the action is brought in the United States court, "and *probably* that is as far as it goes in defining jurisdiction." In *Engel* v. *Davenport*, 228 Pac. 710, 712, the Supreme Court of California at first held that the state court was without jurisdiction, but on rehearing reversed this decision upon the assumption that the matter had been disposed of by the decision of this Court in *Johnson* v. *Panama Rail Road Co.*, 264 U. S. 375. However, in that case, the action was originally brought in a federal court, and the only question involved was whether it should have been brought in the court of the district wherein was located the defendant's principal place of business. This court, observing that both district courts had general jurisdiction of the subject-matter, held that the right to try the case in one district rather than the other had been waived by failure to raise the point by special appearance. The question involved here is a fundamental question, as to whether or not the exclusive jurisdiction conferred by the Constitution upon the courts of the United States in maritime cases has been asserted under the provisions of the Jones Act. If so asserted there would seem to be no doubt that the jurisdiction of the federal courts is exclusive. That the case of *Johnson* v. *Panama Rail Road Co., supra,* was not deemed by this court as a final decision upon this point, would seem to follow from the apparent reservation of this question made in the recent case of the *Matter of the East River Towing Co.*

Upon the other hand, the decisions of the United States District Courts, so far as they go, seem to fairly hold that the jurisdiction of the federal courts is exclusive. See *Wenzler* v. *Robin Line SS. Co.*, 277 Fed. Rep. 812, 817, opinion by Judge Cushman. To the same effect is *Lorang* v. *Alaska SS. Co.*, 298 Fed. 547, 549, opinion by Judge Netterer. See, also, *Barrington* v. *Pacific Mail SS. Co.*, 282 Fed. 900.

The principle upon which it is contended that the state court has no jurisdiction of an action under the Jones Act is that the Jones Act for the first time creates a new liability upon the part of the shipowner towards seaman employees, viz., the liability of a railroad towards its employees, including a liability, among other things, for the negligence of a co-employee, which previously did not exist under the maritime law. This new general liability upon the part of the shipowner is coupled with a provision for a special remedy, and if this be true, it would seem to follow that this remedy alone, to wit, an action at law or in admiralty in the federal court, must be pursued (see *Pollard* v. *Bailey*, 20 Wallace 520; *Middletown National Bank* v. *Toledo etc. Railway Co.*, 197 U. S. 394, 405, and *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 365). In the *Middletown National Bank* v. *Railway Co.*, *supra*, this principle was applied in an action brought outside of the State of Ohio to recover dues from stockholders of that state, and it was held that the action could not be maintained, but that "the statutory method providing for the enforcement of rights in the courts of the state must be followed."

Your petitioner is advised that a writ of certiorari has been granted on the petition of the plain-

tiff in the case of *Engel* v. *Davenport, supra,* to review the decision of the Supreme Court of California. The plaintiff, however, in that case assumes the jurisdiction of the state court, and the point sought to be reviewed is the question as to whether the state statute of limitation or the statute of limitation prescribed by the Employers' Liability Act, now incorporated in the Seamen's Law, applies. The case would seem, however, to indirectly involve the question of jurisdiction as between the state and federal court in an action brought by a seaman. But whether that case directly covers the question of jurisdiction in all its aspects or not, it would seem appropriate that the writ of certiorari should be allowed in the present case, first, to settle the jurisdictional scope of a federal statute of general application as to which there exists at present great confusion; and, second, that the rights of this defendant should be properly protected in event that this court should in the meantime hold in any other case that the state courts are without jurisdiction under the Act in question.

Respectfully submitted,

RICHARD REID ROGERS,
Solicitor for Petitioner.

FILED
OCT 3 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM—1925.

No. 260.

PANAMA RAIL ROAD COMPANY,

Plaintiff-in-Error,

against

AGUIPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanches, deceased,

Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR CONCURRING IN MOTION TO ADVANCE CASE.

RICHARD REID ROGERS,
Solicitor for Plaintiff-in-Error,
No. 63 Wall Street,
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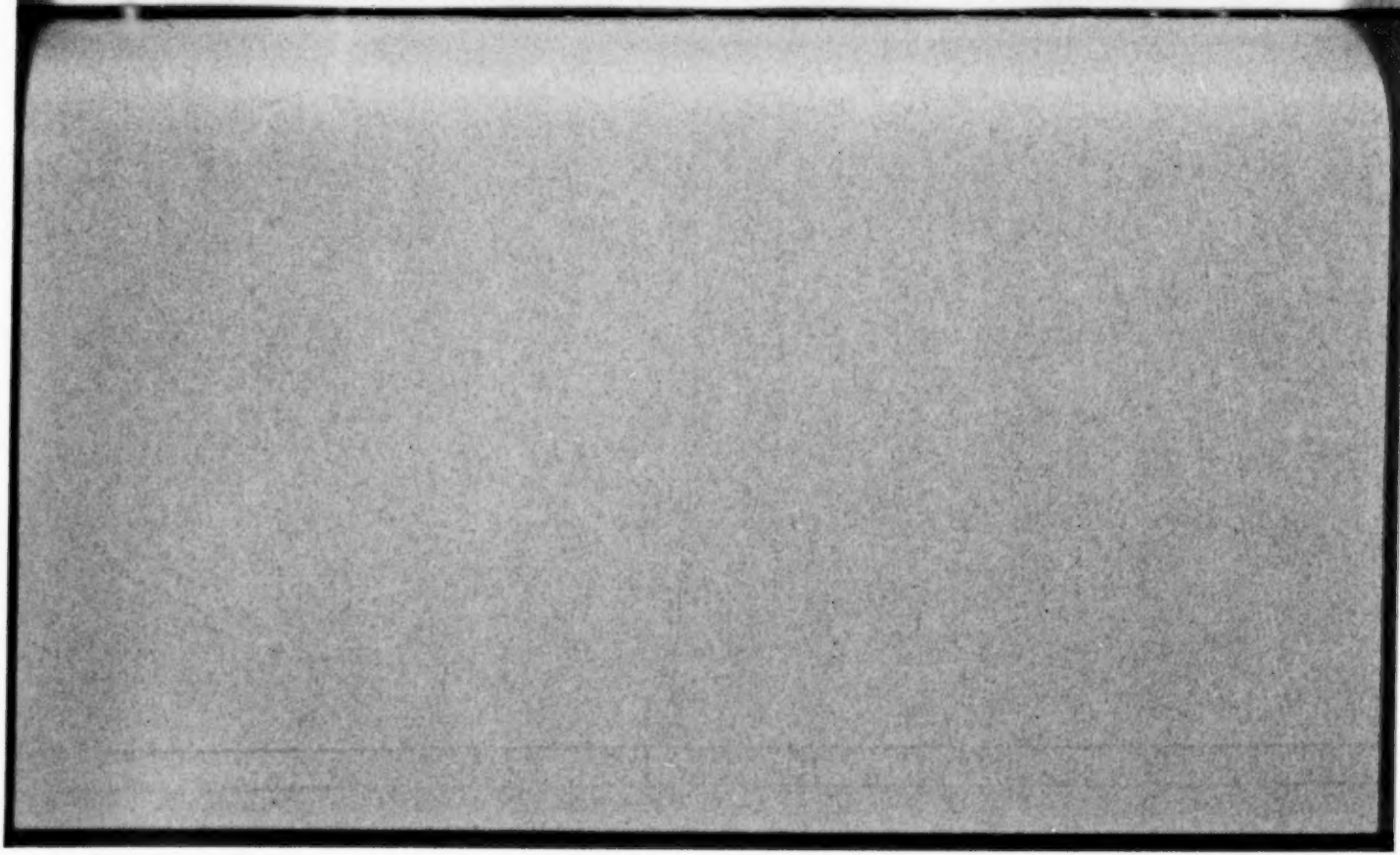
The Hecla Press, 57 Warren St., N. Y. Tel. Walker 1490.



Supreme Court of the United States

OCTOBER TERM—1925.

PANAMA RAIL ROAD COMPANY,
Plaintiff-in-Error,

against

AGUIPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanches, deceased,
Defendant-in-Error.

Counsel for plaintiff-in-error hereby concurs in the motion to be made in this Court by counsel for defendant-in-error on Monday, October 5th, 1925, for advancement of this cause on the calendar of said Court.

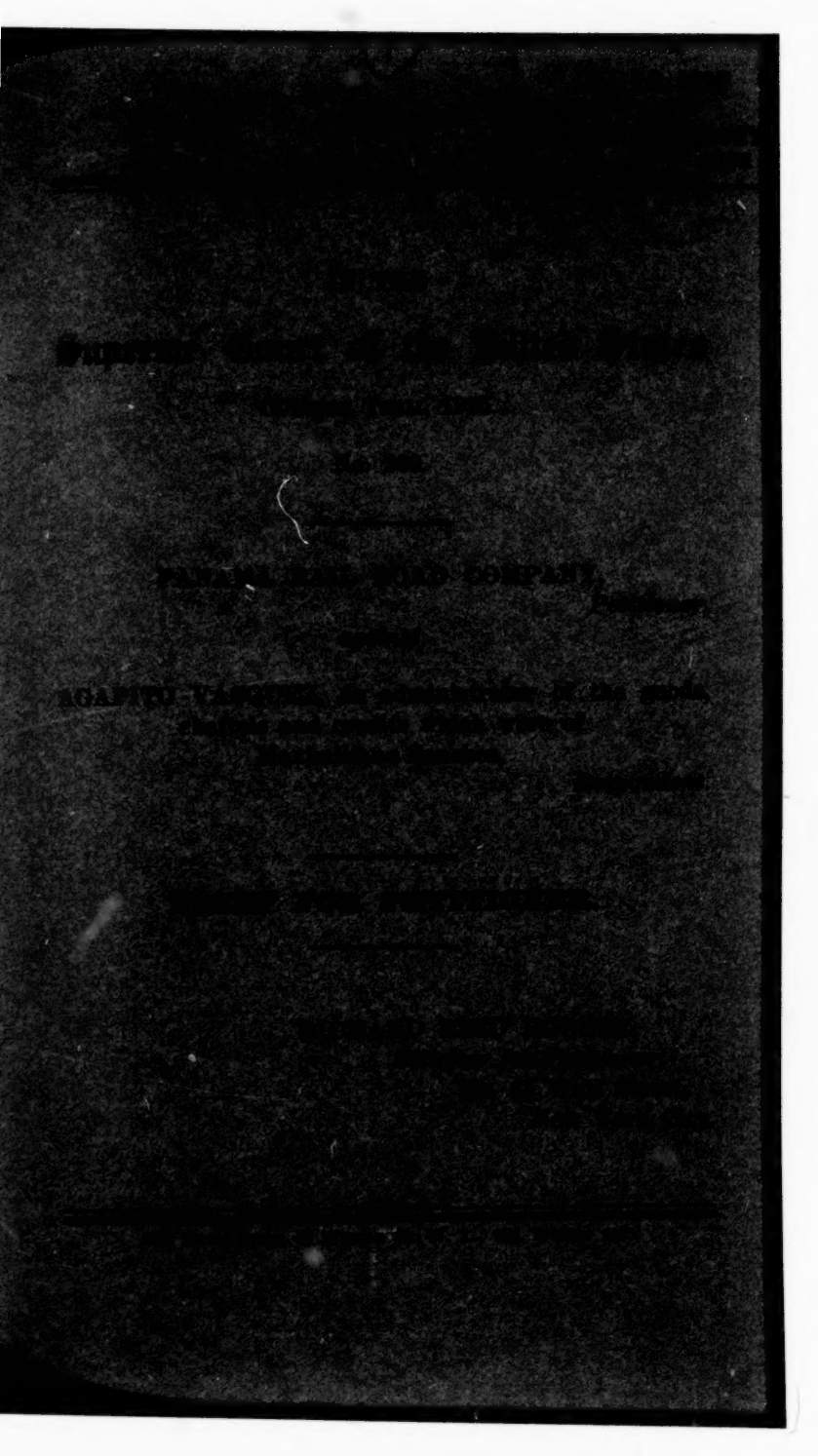
This appeal involves the question whether the Courts of the several States have jurisdiction of actions brought under Section 33 of the Act of Congress of June 5th, 1920, 41 Stat. 1007, commonly known as the "Jones Act," relating to the rights of seamen to recover against their employers for personal injuries sustained in the course of their employment.

As more particularly pointed out in the brief of the petitioner in support of the application for the writ of certiorari which has been granted by this

Court, a conflict of decisions exists upon the foregoing jurisdictional question. The question has never been passed upon by this Court, and it is important in the interests of all parties concerned that a decision thereof should be had as early as possible.

Respectfully submitted,

RICHARD REID ROGERS,
Solicitor for Plaintiff-in-Error.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 260.

PANAMA RAIL ROAD COMPANY,
Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

Statement.

This is an action brought by Agapito Vasquez, administrator, to recover damages for the death of his intestate, Maximiliano Sanchez. Sanchez was a coal passer on board the steamship "General W. C. Gorgas," owned and operated by the Panama Rail Road Company, and his death occurred from an electric shock received by him while working in the fire room of that vessel while lying in drydock at Staten Island (Rec., p. 16). Sanchez was

engaged in building a wall between one of the boilers upon the vessel and the one opposed to it. He had with him a portable electric lamp connected by cable with the source of current from the shore. He apparently fell and in falling broke the globe of the lamp which he was carrying in his hand. His death was instantaneous, and was attributed to electric shock. Negligence was alleged upon the ground that the wire and its appurtenances were dangerous and out of repair, and not properly insulated and protected. The cable was produced upon the trial, and showed no apparent defect in the insulation. Moreover, the insulation was adequately tested at the time of the accident and found to be perfect (Rec., p. 90).

The question involved in this appeal, however, is not that of negligence, but one of jurisdiction as between the state and federal courts. The action was brought under Section 33 of the Act of Congress of June 5, 1920, commonly known as the "Jones Act," in the state court in Kings County, State of New York. The defendant's principal place of business was in the Borough of Manhattan, County of New York, State of New York. The County of Kings lies within the jurisdiction of the Eastern District of the United States Courts of the State of New York, and the defendant's principal place of business lies within the jurisdiction of the Southern District of the United States Courts in the State of New York.

The Jones Act (amending Section 20 of the Seamen's Act of March 4, 1915), 41 U. S. Stats. 1007, provides as follows:

> "Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or

remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Upon the opening of the case, the defendant moved to dismiss the complaint upon the ground that the state court had no jurisdiction, and upon the further ground that it appeared that the defendant's office was in the County of New York (Rec., p. 10). A verdict was rendered for $9,900, which the trial court reduced to $7,000, and from the judgment entered upon this verdict an appeal was taken to the Appellate Division of the Supreme Court for the Second Department, and there affirmed (Rec., p. 120). From the decree of affirmance by the Appellate Division, an appeal was taken to the Court of Appeals of the State of New York, which affirmed the case without opinion (Rec., p. 124). From this final judgment of the court of last resort in the State of New York a writ of certiorari was sued out to this court, which was allowed (Rec., p. 125). The case was then advanced for argument. The sole point involved upon this appeal is the question as to whether the state court had jurisdiction of the action.

POINT I.

The state court is without jurisdiction of a death action brought under the Jones Act.

There has been up to the present time a conflict of judicial opinion upon the point whether the state courts have jurisdiction of actions brought under the Jones Act. In certain early cases in New York (*Nox* v. *U. S. S. Board,* 193 N. Y. Supp. 340, and *Pricto* v. *U. S. S. Board,* 117 Misc. 703) it was held by different judges that the state courts had no jurisdiction. Upon the other hand, the Appellate Divisions in New York in the cases of *Tammis* v. *Panama Rail Road Co.,* 202 App. Div. 226, and *Lynott* v. *Great Lakes Transit Corp.,* 202 App. Div. 613, sustained the jurisdiction of the state courts in such actions. The case of *Lynott* v. *Great Lakes Transit Corp., supra,* was affirmed without opinion by the New York Court of Appeals (234 N. Y. 626), just as the judgment of the Appellate Division in the present case was affirmed without opinion. The only opinion rendered by the Court of Appeals in which the matter is even remotely discussed is *Patrone* v. *Howlett,* 237 N. Y. 394, 397, and even there, as will be seen from the accompanying extracts, the consideration was somewhat casual. The Court of Appeals declined to dismiss that case because the point of jurisdiction was not made by the appellant, the Court saying at page 397:

> "Jurisdiction herein relates to the subject-matter of the action and cannot be conferred by consent. The court may of its own motion dismiss the action where it has no jurisdiction of the subject-matter (Robinson v. Oceanic S. Nav. Co., 112 N. Y. 315, 324). If the United States has prescribed the conditions under which action for death of a seaman may be brought so as to exclude the state courts,

> the litigants cannot dispense with those conditions. Appellant does not make this point. It asks to have the complaint dismissed on the merits. In view of our decision in the Lynott case, I think that we should not dismiss the complaint on our own motion for lack of jurisdiction."

The Court, however, proceeded to say:

> "The Jones Act gives a seaman an action at law in place of the common-law remedy reserved to him in addition to his action *in rem* in admiralty by the Judiciary Act of 1789. Prior to its passage he had the right to resort to the state courts whenever they were competent to give a remedy. It does not expressly or by necessary implication take away the right to resort to the state courts. It provides for the venue, when the action is brought in the United States court, and probably that is as far as it goes in defining jurisdiction. We have in effect so held in the Lynott case (supra)."

In *Engel* v. *Davenport,* 67 Cal. Dec. 325, a personal injury suit, and now in this court on certiorari, the Supreme Court of California has held both ways upon this question; being influenced on the rehearing by the decision in *Johnson* v. *Panama Rail Road Co.,* hereinafter referred to.

Upon the other hand the early decisions of the United States District Courts seem to fairly hold that the jurisdiction of the federal courts is exclusive. See *Wenzler* v. *Robin SS. Co.,* 277 Fed. 812, 817, opinion by Judge Cushman. To the same effect is *Lorang* v. *Alaska SS. Co.,* 298 Fed. 547, 549, opinion by Judge Neterer. See, also, *Barrington* v. *Pacific SS. Co.,* 282 Fed. 900, opinion by Wolverton, J.

In the more recent decisions in the United States District Courts, dealing with the question of removal to the federal court of actions which have been instituted in the state courts under the Jones Act, the federal courts as-

sumed the state court jurisdiction. In *Beer* v. *Clyde SS. Co.*, 300 Fed. 561, and *Herrera* v. *Pan American Petroleum Co.*, 300 Fed. 563, Judge Augustus Hand reached the conclusion that the Jones Act adopted the Employers' Liability Act *in toto*, including the provision contained in the latter prohibiting the removal to any court of the United States of any action brought by express authority of that Act in the state courts. In *Atianza* v. *U. S. Shipping Board*, 3 Fed. (2nd) 845, Judge Garvin followed the decision of Judge Hand. In the recent unreported case of *Cook* v. *Alaska SS. Co.*, Judge Neterer remanded a case brought under the Jones Act to the state court upon the ground that this court in *Re Matter of Petition of East River Towing Co.*, 266 U. S. 355, had recognized the concurrent jurisdiction of state and federal courts under the Jones Act.

The decision of this question, however, seems up to the present time to have been avoided by this court. In *Johnson* v. *Panama Rail Road Co.*, 264 U. S. 375, in which the constitutionality of the Jones Act was affirmed, the action was brought in the federal court of the Eastern District of New York, and in that case it was held that the only question involved was whether it should have been brought in the federal district wherein the defendant's principal place of business was located. But this court observed that both district courts had general jurisdiction of the subject-matter, and that the right to try the case in one federal district rather than the other was waived by the failure to raise the point by special appearance. The question involved here, however, is the fundamental question of the jurisdiction as between the state and federal courts, and as said by the Court of Appeals in *Patrone* v. *Howlett, supra*, "if the state court has no substantive jurisdiction of such an action, it cannot be conferred by consent."

In *Matter of Petition of the East River Towing Co.*, 266 U. S. 355, the question of the jurisdiction of the state court in an action brought under the Jones Act was apparently reserved. This seems to follow not only from the guarded language with which the opinion in that case concludes; but it also must be assumed that if that case had been deemed decisive of the question here involved, the writ of certiorari in the present case would not have been allowed.

The contention that the state court is without jurisdiction in an action brought under the Jones Act to recover damages for injuries resulting from the death of a seaman in maritime territory is predicated upon two grounds: *First*, the action is maritime in its nature, and there now exists under the laws of New York no concurrent jurisdiction in the state courts to recover damages for the death of a seaman occurring in maritime territory; the jurisdiction of the United States courts, therefore, under the Constitution, the statutory law and the decisions of this court, is exclusive; and *Second*, even if the first proposition be not true, Congress, legislating within its constitutional powers, has now for the first time created a liability upon the part of a shipowner for the death of a seaman in navigable waters occurring within the geographical limits of a state, and has in the act creating this liability provided a special remedy for its enforcement—that is to say, an action in the United States court of the district wherein the defendant resides or has its principal place of business, which remedy, to wit, an action in a federal court, is the only one by which the new right thus created can be enforced.

A.

The action is maritime in its nature, and there now exists under the laws of New York no concurrent jurisdiction in the state courts to recover damages for the death of a seaman occurring in maritime territory; the jurisdiction of the United States courts, therefore, under the Constitution, the statutory law and the decisions of this court, is exclusive.

The jurisdiction of the courts of the United States in maritime matters is exclusive. It is probably made so by the Constitution, but in any event it is so provided in the original Judiciary Act of 1789, and this provision is continued in Section 256 of the Judicial Code, wherein it is stated that the jurisdiction of the courts of the United States in civil causes of admiralty and maritime jurisdiction "shall be exclusive of the courts of the several states," there being saved to suitors in all causes under both provisions of the law, the right of a common law remedy where the common law is competent to give it. The exclusive character of the jurisdiction of the courts of the United States in maritime matters, as was later stated in the case of *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 640, was first called to the attention of this court in *The Moses Taylor,* 4 Wall. 411, 429. The language of Justice Field, delivering the unanimous opinion of the court in that case, was as follows:

> "The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares

> that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the Federal courts."

It might be said that this decision relates to an exclusive jurisdiction established by Congress; but other cases treat the exclusive jurisdiction of maritime causes by the United States courts as constitutional.

In the great case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, this court, through Justice Story, analyzed the maritime jurisdiction of the courts of the United States under Section 2 of Article III with great detail and powerful logic. With respect to the introductory words "the judicial power shall extend," the opinion reached the conclusion that these words were used in an "imperative sense," and that they imparted an absolute grant of judicial power (p. 331). Justice Story then proceeded to classify the judicial powers conferred by the Constitution upon the courts of the United States. He observed that the first class includes cases arising under the Constitution, treaties and laws of the United States, cases affecting ambassadors, and cases of admiralty and maritime jurisdiction. This class is preceded by the word "all." As to the second class, including all other cases of national cognizance, as where the jurisdiction is dependent upon the character of the parties, the word "all" is dropped seemingly, he says, *ex industria*. It is hardly to be presumed that the variation in language could have been accidental. Hence he

concludes that it may have been the intention to imperatively extend the judicial power to all cases of the first class, and as to the second class to leave Congress to qualify the jurisdiction in such manner as public policy might dictate. The vital importance of the cases of the first class is then alluded to as follows (p. 334):

> 'In the first place, as to cases arising under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty."

Without altogether resting the decision of the court upon the foregoing grounds, he concludes (p. 337):

> "no part of the criminal jurisdiction of the United States can, consistently with the constitution, be

> delegated to the state tribunals; the admiralty and maritime jurisdiction is of the same exclusive jurisdiction."

In *Claflin* v. *Houseman, Assignee*, 93 U. S. 130, it was observed that Congress had not always observed the distinction between those cases of federal jurisdiction where the word "all" precedes the grant, and those cases where it is omitted.

But in *Stevenson* v. *Fain*, 195 U. S. 167, the argument of *Martin* v. *Hunter* was applied to those cases put in the second class by Justice Story, where the word "all" was omitted and the word "controversies" substituted for "cases." The court said:

> "The use of the word 'controversies,' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

The necessary converse of this declaration is, of course, that in the class of causes where the word "all" is used, and the word "cases" takes the place of "controversies," Congress is not authorized to define controversies over which it may exercise jurisdiction and the manner in which it is done. In this connection see the interesting reasoning of District Judge Ervin in the recent case of *Farrell* v. *Waterman SS. Co.*, 291 Fed. Rep. 604.

Again in *Butler* v. *Boston Steamboat Co.*, 130 U. S. 527, the a[illegible]y and maritime jurisdiction was held to be exc[illegible]e. See also *Southern Pacific* v. *Jensen*, 244 U. S. 205, 218.

> that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added 'any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed.' "

It is, of course, possible to find decisions here or elsewhere which seem not altogether consistent with this principle; but it is evident that there could be no such thing as an exclusive admiralty jurisdiction of the courts of the United States, if the test were the ability of state legislatures to create in the state courts remedies assimilated to those prevailing in admiralty. There must be some logical ground then upon which the universally admitted *exclusive* jurisdiction of the federal courts in maritime causes of action can be rested. That is to say, there must be some reasonable limitation imposed upon the scope of the saving clause, or else the proviso would cancel and become more important than the law itself, to which it is only an exception, and would thus become void under the Constitution. The principle no doubt is that first expressed by this court in *The Moses Taylor* (at p. 431), and many times repeated since (*Knapp* v. *McCaffrey,* 177 U. S. 638, 644; *Moran* v. *Sturges,* 154 U. S. 256, 276; *Southern Pacific* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149), that what is saved by Section 9 of the Judiciary Act of 1789 was "not a remedy *in* the common law courts, but a common law remedy." That is to say, that the *concurrent* jurisdiction of the state courts, if reached through the Saving Act, must be based upon a right and a remedy always known to that law, and not upon the arbitrary creation of a new right or a new remedy under the guise of statutory amendment of the common law. Nor is the principle invoked here new or unknown to this court. It was indeed the very primitive doctrine enunciated in this court when

first defining the true scope and limitations of the saving clause. In the important case of *Waring* v. *Clarke*, 4 How. 450, 460, which first brought the admiralty jurisdiction *infra corpus comitatus*, this Court said:

> "In respect to the clause in the 9th section of the Judiciary Act 'saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it' we remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away."

It would not seem that this statement can be construed to mean other than this: that where there was no right known to the common law when the Constitution was adopted—and where there was no right there could, of course, be no remedy—there was no concurrent jurisdiction in the state courts; and, therefore, nothing upon which the saving clause could act. This distinction was further elaborated by Justice Story in his commentaries upon the Constitution in a passage which received the express approval of this court in *Taylor* v. *Carryl*, 20 How. 583, 598:

> " 'The reasonable interpretation,' continues the commentator, 'would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modification in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the

> courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction' (3 Story's Com., Sec. 1666, note)."

Now, the case at bar was an action for damages for instantaneous death. It was not an action for injuries received which originally vested in the injured employee, and which upon his death under certain survival statutes may be said to have passed to his beneficiaries, although the distinction perhaps is not of first importance. Such as it was, however, it was an action founded upon a right wholly unknown to the common law (*The Harrisburg*, 119 U. S. 204, 213; *The Alaska*, 130 U. S. 201, 209; *La Bourgogne*, 210 U. S. 95, 138; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240).

"Until a right exists there can be no remedy" (*Dougan* v. *Champlain Trans. Co.*, 56 N. Y., at p. 5). There being neither right nor remedy, therefore, at the common law to support an action such as that in the case at bar, no jurisdiction in the state courts exists which can be saved to them by the proviso of Section 9 of the Judiciary Act.

I speak of the state of the law as it is to-day, and as it was when this action was brought. There was, no doubt, an interval of time between the adoption of Lord Campbell's Act in the State of New York and the passage of the Jones Act, when it was otherwise. Prior to the Jones Act the death statutes of New York extended into maritime territory, and under these statutes an action such as that instituted here could be maintained in the state courts. The state statute indeed was the only statute which at such time gave any right of action whatsoever, and death actions were permitted under that act although the death itself occurred in maritime territory. Such state statutes, filling a vacuum which otherwise would have existed, were given effect in the admiralty courts of the United States "be-

cause they merely supplemented the substantive maritime law" (*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 125; *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95). There was perhaps this inconsistency in thus "supplementing the substantive maritime law" by the adoption of the death statutes of the various states. Such statutes were in no sense uniform. It were indeed conceivable in any state where the principle of Lord Campbell's Act might not have been adopted or might be repealed, that there would be no law upon the subject at all. In some states, as New York, contributory negligence, however slight, would be a bar to the recovery; in other states it would merely diminish the damages. In some states complete damages might be recovered; in others, where a statutory maximum was prescribed, there might be only a partial recovery. The period of time within which such actions could be brought, as well as the law of negligence and the rules of evidence, would greatly vary. And the beneficiaries of a recovery would not be always the same. It might well be doubted whether the principle adopted in *The Hamilton* and succeeding cases, at least to an equal extent with the compensation laws of the several states which were later held to be invalid, did not conflict with "the harmony and uniformity in maritime law which the Constitution not only contemplated but actually established" (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164). That being true, there was every reason why Congress should have passed a statute upon this subject importing a direct change into the maritime law itself (*Johnson* v. *Panama Rail Road Co.*), and introducing a principle of uniformity which the conflicting state laws vicariously adopted by the judiciary were far from supplying. There was also every reason why Congress having occupied the field, the state statutes should no longer be operative. And so, indeed, they ceased to be. This express point was

decided by the Court of Appeals of the state from which this case proceeds, in *Patrone* v. *Howlett,* 237 N. Y. 394, 397. The language of the court in that case is as follows:

> "But plaintiffs did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law (Western Fuel Co. v. Garcia, 257 U. S. 233, 241)."

There being at the present time, therefore, but one cause of action and one remedy for the death of a seaman on navigable waters, occurring within the geographical confines of New York, and that being the right and remedy given by the Act of June 5, 1920, amending Section 20 of the Seamen's Law, the remedy under this Act, to wit, an action in the federal courts of the United States, must necessarily be deemed exclusive of any jurisdiction in the state courts of New York, if any effect whatsoever is to be given to the oft-declared doctrine of exclusive maritime jurisdiction in the courts of the United States.

The ground upon which the appellate courts of New York have apparently upheld the jurisdiction of the state courts of actions brought under the Jones Act, was that this Act contained no specific words of exclusion of state court jurisdiction. But the correct rule is the other way around. Whether it is within the power of Congress to confer state court jurisdiction of a maritime cause where there is no concurrent cause of action under the laws of the state, it is unnecessary to inquire. The position of Congress on this matter has always been that a positive provision of law was necessary to keep alive the state court jurisdiction.

Thus, when under the Act of March 30, 1920 (41 Stats. 538, Compiled Stats. §12511/2), a cause of action was created for wrongful death on the high seas, it was specifically provided by Section 7 "the provisions of any state statute

giving or regulating rights of action or remedies for death shall not be affected."

When, under the Employer's Liability Law, Congress under its power to regulate commerce passed a death statute for the benefit of the families of interstate employees, it likewise provided specifically that the jurisdiction under the new act should be "concurrent with that of the courts of the several states," and that no case so brought should be removable to the United States courts (35 Stats. 66, Sec. 6).

When under the Ship Mortgage Act (41 Stats. 1003), a right of action was conferred upon mortgagees of a vessel to recover pecuniary losses for the failure of the collector of the port or shipowner to comply with the provisions of that Act, it was expressly provided that the jurisdiction of the United States courts should "not be to the exclusion of the courts of the several states."

In the Act of 1845, where the courts of the United States were given the same jurisdiction of torts upon boats of twenty tons burden and upwards navigating the lakes of the several states, as upon vessels navigating the high seas and tidewaters, an express provision preserved the concurrent jurisdiction of the state courts (5 Stats. 726).

In the passage from *The Hine* v. *Trevor,* quoted above, this court laid particular stress upon this circumstance; and in doing so may be said to have approved the rule that in maritime matters an express reservation is required if the otherwise exclusive jurisdiction of the United States courts is to be shared with those of the several states.

B.

Even if the first proposition be not true, Congress, legislating within its constitutional powers, has now for the first time created a liability upon the part of a shipowner for the death of a seaman in navigable waters occurring within the geographical limits of a state, and has in the act creating this liability provided a special remedy for its enforcement—that is to say, an action in the United States court of the district wherein the defendant resides or has a principal place of business; which remedy, to wit, an action in a federal court, is the only one by which the new right thus created can be enforced.

As said in *The Moses Taylor,* 4 Wall. at page 429, "the judicial power of the United States is in some cases unavoidably exclusive of all state authority, and in all others it may be made so at the election of Congress." The Jones Act, in occupying the field to the exclusion of all state laws on the subject, and in providing for the first time for an action for death occurring on the navigable waters within a state, prescribes by the same act the remedy and regulates the jurisdiction: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." So far as I am aware, no court, state or federal, has ever construed the phrase "court of the district in which the defendant employer resides" to mean other than the United States court of such district. The suggestion of the Court of Appeals of New York in *Patrone* v. *Howlett,* 237 N. Y. 394, 397, was that, assuming that

the language meant the district court of the United States, it merely provided for the venue where the suit was filed in a federal court as distinguished from a state court. The argument as to the meaning of this phrase is well set forth by Judge Cushman in *Wenzler* v. *Robin Line SS. Co.*, 277 Fed. 812, 817:

> "In using the words 'shall be under the court of the district,' etc., Congress, doubtless, had mainly in mind the continental United States, comprising the several states. The territory included in a single jurisdiction of a state court may be called a 'district'; but it is not always so designated. It will be noted that the expression is 'court of the district'; the word 'court' and not 'courts' is used —that is, the singular and not the plural.
>
> "In all of the states, the districts in which courts of the United States sit geographically include or cover the same territory that is covered by the courts of the several states in their exercise of general jurisdiction. If it had been intended by this act alone to confer jurisdiction on the United States District Court, and expressly recognize, at the same time, that of the courts of general jurisdiction of the state in which such district court was held, the word used would not have been 'court,' but doubtless would have been 'courts' and it would not have been limited to districts, but language would have been used similar to that of subsection J of Section 30, already appearing in the act before the above-quoted language of section 33, amending section 20 of the LaFollette Act. The language of subsection J, inter alia, is:
>
> > '(c) * * * The District Courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several states, territories, districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. * * *' 41 Stat., p. 1003.

"Congress, in conferring jurisdiction, must be presumed to intend conferring it on its own courts, the national courts. Congress may, of course, within the sphere of national authority, deprive the state courts of jurisdiction. The extent to which it may or may not confer jurisdiction over federal questions upon a state court it is not necessary to consider. The jurisdiction of the state courts being general in its nature, that general jurisdiction may be so far recognized by Congress by legislation concerning the enforcement of rights arising out of federal law as to leave the door of the state court open to the litigant. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

"The language used in the saving clause:

'Saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' Section 24, Judicial Code (3).

—was appropriate to the end in view. Congress did not seek to confer a power, but rather to leave undisturbed any rights to sue at common law, including the right to sue in a state tribunal.

"Section 20 of the La Follette Act, as amended (section 33 of the Jones Act) provides that any seaman may, at his election, maintain an action for damages at law; that is, he does not have to sue in the admiralty, but may sue at law in the District Court. If Congress had intended anything else, the language would have been 'may at his election maintain in the state court an action at law.'"

Assuming, therefore, that the phrase "court of the district" means the federal court of the "district," the general principle of law applies that where a new right is created and the court wherein that right may be prosecuted is defined, no other court has jurisdiction of the

matter. As said by Judge Wolverton in *Barrington* v. *Pacific SS. Co.*, 282 Fed. 900:

> "Jurisdiction under the present statute is not founded upon diversity of citizenship, but upon the fact that the plaintiff is a seaman, and that, being a seaman, he is entitled to his action for personal injuries in a court having jurisdiction of the cause. The action is special to seamen, which creates a new remedy, and the court authorized to entertain jurisdiction of the cause is one specially designated. In the sense, therefore, in which it is so designated, it is constituted, for the purpose of actions by seamen for personal injuries, a court of special, and not general jurisdiction. The mandatory language of the statute indicates as much. Mark the language:
>
> 'Jurisdiction in such actions *shall* be under the court of the district,' etc.
>
> "So it would appear by usual interpretation that no other court has jurisdiction of the cause, except the court of the district in which the defendant employer resides or in which his principal office is located. There is a reason for this; the purpose obviously being to prevent seamen from suing the owners and lessees of vessels in any port of the country away from their residence or principal place of business. There can be no analogy to the statute where general jurisdiction is given on the ground of diversity of citizenship and the venue depends alone upon the residence of the parties. In this view, the case of *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.* (C. C.), 178 Fed. 117, is without application, and I am unable to agree with its application in Johnson v. Panama R. R. Co. (D. C.), 277 Fed. 859."

The principle, which Judge Wolverton invoked in this case as one of "usual interpretation," has been many times applied in the state courts of the United States (*Reed* v. *Omnibus R. R. Co.*, 33 Cal. 212, 217; *Aldrich* v. *Hawkins*,

6 Blackford [Ind.] 125; *Hendreschke* v. *Harvard High School*, 35 Neb. 400, 401; *Macklot* v. *Davenport*, 17 Ia. 379, 387; *Dodson* v. *Scroggs*, 47 Mo. 285; *Dudley* v. *Mayhew*, 3 N. Y. 11. It is well stated in the case of *Hendreschke* v. *Harvard High School* above, as follows:

> "The rule is well settled that where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to that subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested."

The rule has a venerable antiquity in the English law. It was applied in principle by all the judges in England sitting in the celebrated case reported by Lord Coke (*Coke's Reports*, Pt. 7, 36, 37a), in which the judges held that Queen Elizabeth was without power to grant the penalty or benefit of a penal statute, or to transfer the power of dispensation to an officer of the crown. The Queen's act was held to be invalid, among other reasons, because "neither can any penal statute be prosecuted or executed in other manner or order of proceeding than by the act itself provided and prescribed." In the equally famous cases of *Millar* v. *Taylor* and *Donaldson* v. *Becket*, in the House of Lords, 4 Burrows 2305 *et seq.*, where it was held, nearly all the judges in England delivering opinions, that there was no common law property of copyright, the doctrine was frequently asserted. Willes, J., said "if the act has prescribed the remedy for the party aggrieved, and the mode of prosecution, all other modes and remedies are excluded" (p. 2323). Aston, J., remarked (p. 2351) that "the question (as to the common law remedy) wholly depends upon the point whether it be a right newly created or not. If it was, then it would receive its birth, duration and remedy from the statute and no other remedy could be pursued." Lord Mansfield concurred with these opin-

ions. In the House of Lords six of the judges expressed the opinion that by the Statute of 8th Anne, an author was precluded from every remedy except on the foundation of the statute, and on the terms and conditions prescribed thereby, and so the House found on the motion of Lord Camden, supported by the Lord Chancellor.

But the case most precisely in point, no doubt, is the New York case of *Dudley* v. *Mayhew*, 3 N. Y. 11, from which the foregoing interesting summary of the opinions in *Millar* v. *Taylor* is taken. Under the power conferred upon Congress by the Constitution (Art. 1, Sec. 8, Subdiv. 8), to secure to authors and inventors for a limited time, the exclusive right to their respective writings and discoveries, Congress by the Act of July 4, 1836, provided that all actions arising under any law of the United States confirming to inventors the exclusive right to their discoveries "shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any District Court having the powers of a Circuit Court."

The decision of the Court of Appeals, that the state courts had no jurisdiction of patent litigation, was expressly predicated upon the principle of law above invoked (p. 15). Recognizing that the principle was inapplicable where a right was conferred and no remedy for its invasion was specified, the Court said: "It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms part of the remedy, and all others are excluded." It is difficult to perceive any substantial ground upon which this case can be distinguished in principle from the case at bar.

The foregoing doctrine has also been applied in principle in several cases in this court. In *Pollard* v. *Bailey*, 20 Wall. 520, 527, this court held that a statutory liability

of a stockholder to creditors could not be enforced in an action at law, but only by a bill in equity as seemed to be provided under the act creating the liability. After stating that the individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute; that at common law it did not exist; and that a statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement, this court said:

> "The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

In *Middletown Nat'l Bank* v. *R. R. Co.,* 197 U. S. 394, 405, this principle was directly applied to an action brought outside of the State of Ohio to recover on the stockholders' liability given by the statutes of that state, and it was held that the action could not be maintained; but that the statutory method providing for the enforcement of the right, to wit, "an action in any common pleas court" of the State of Ohio, must be followed. This court said:

> "The statute under such circumstances may be said to so far provide for the liability and to create the remedy as to make it necessary to follow its provisions and to conform to the procedure provided for therein."

See also:

> *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, 365.

It would therefore appear that Congress having created a new right in admiralty, and provided a remedy for its enforcement, viz., an action in the federal court of defendant's district, the remedy thus created is the only one that can be pursued; unless, indeed, the defendant by its consent, express or implied, consents to be sued in some other federal court having the substantive right to enforce the remedy.

There remains to be considered the argument in favor of the jurisdiction of the state courts, predicated upon the theory of a wholesale adoption by the Jones Act of "all statutes of the United States conferring or regulating the right of action in the case of railway employees," including as a part of such adoption the provision of the Employer's Liability Act specifically conferring upon the state courts jurisdiction of actions brought to enforce the liability defined by that statute, and prohibiting the removal of such actions to the federal courts. If the first clause of the Jones Act, viz., that in an action at law by an injured seaman "all statutes of the United States, modifying or extending the common law right or remedy in cases of personal injury to railroad employees shall apply," be read in connection with the concluding clause, it will be seen, however, that what is intended by the cross reference to such statutes is the adoption of the *substantive modifications* of the common law relating to cases of injuries or death. Indeed, this court has said so much. In *Matter of East River Towing Co., ubi supra,* this court said:

> "The short point is that the later Act (Jones Act) determines the extent of the seaman's substantive rights and the measure of damages."

And again:

> "The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of

> principles, not as a basis for a meticulous discovery of conflict with an established system in matter of detail."

It is evident that Congress in the Jones Act could not have intended to go further than this.

Many statutes of the United States relating to railway employees would have no possible application to employees on vessels navigating the high seas; as, for example, the provisions of the Safety Appliance Act (27 Stats. 531); the provisions of the Boiler Inspection Act (36 Stats. 913); the Hours of Service Act (34 Stats. 1415); the provisions in the Employer's Liability Act inhibiting the defense of assumption of risk where the provisions of any statute enacted for the safety of employees had not been complied with (35 Stats. 66). But nowhere is the conflict between the Employer's Liability Act and the Jones Act more apparent than at the precise point under consideration. In the Employer's Liability Act it is provided that an action under the Act "*may* be brought in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business, at the time of commencing such action." And it is further definitely provided that the jurisdiction of the courts of the United States under the Act shall be *concurrent* with that of the courts of the several states, and that no action commenced in any state court shall be removed to any court of the United States. Under the Jones Act "jurisdiction in such actions *shall* be under the court of the district in which the defendant employer resides or in which his principal office is located"; no other district is considered; and there is no provision for concurrent state court jurisdictions. The provisions of the Jones Act are thus absolutely in contradiction with those of the Employer's Liability Act; and to hold that the provisions of the Jones Act, that in actions for injuries all statutes

of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees, and that in actions for death all statutes of the United States conferring or regulating the right of action for death, in effect took over intact the jurisdictional provisions of the Employer's Liability Act, is to hold that the express provision of the later specific act was overruled by the general reference to earlier legislation. This is contrary to all canons of statutory interpretation. If there be a specific provision, as there is, in the later act, it must, of course, control. The principle of adoption, thus extended so widely beyond its obvious purpose, would simply obliterate the concluding clause of the Jones Act altogether. If, to illustrate, an action should be brought by a seaman in a district "where the cause of action arose," even if other than that of defendant's residence, it would, under this theory, be properly brought, although the Jones Act specifies distinctly as the only proper district, or at least as the district as to which the defendant is originally vested with certain jurisdictional rights, the district wherein the defendant resides. No matter how diligent the defendant might be in asserting his rights, he could not enforce them; because the principle of construction applied leads inevitably to the conclusion that the specific jurisdictional right granted the defendant under the Jones Act was overruled by the contrary provisions of the preceding Employer's Liability Statute. The utter destruction of the defendant's rights under the concluding clause of the Jones Act becomes even more apparent, when the concurrent jurisdictional provisions of the earlier statute be considered. If that statute is to prevail over the definite provisions of the Jones Act, then an action must be permissible in the state courts according to their own rules of practice, and in New York, under the civil code, it

could be brought in the district of *either* the plaintiff's or the defendant's residence (Civil Practice Act, Sec. 182). Therefore, when, as here, an action is brought in the state district of the plaintiff's residence, the defendant could not by any proceeding whatsoever obtain the benefit of the specific jurisdictional rights conferred upon him by the federal law. What the reference to statutes of the United States in the Jones Act in a death action was intended to bring into that act was exactly what the act itself states, viz., the statutes of the United States "conferring" or regulating the right of action for death. In other words, it was evidently intended, without too much prolixity, to create by reference a right to an action for death in admiralty where none had theretofore existed. To extend the meaning of the act beyond this evident purpose, leads to manifest absurdities, none of which could be more palpable than the repeal, or, nullification, of the express provisions of the later and specific act by pointing to the conflicting provisions of a previous act referred to in only the most general terms.

CONCLUSION.

The case should be dismissed for lack of jurisdiction in the state court.

Respectfully submitted,

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